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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 206

MISSISSIPPI ROAD SUPPLY COMPANY,
Petitioner,

versus

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PAT H. EAGER, JR.,
E. L. TRENHOLM,
Counsel for Petitioner.

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vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, REQUIRING IT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES FOR ITS REVISION AND DETERMINATION THE RECORD AND JUDGMENT IN THE MATTER OF THE APPEAL TAKEN BY PETITIONER AGAINST L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, LATELY PENDING IN SAID CIRCUIT COURT OF APPEALS.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the Mississippi Road Supply Company, a corporation, filed by virtue of the provisions of Section

240(a) of the Judicial Code, as amended, 28 U. S. C. 347(a), 28 U. S. C. A., 347(a), respectfully represents as follows:

I.

Statement of Matter Involved.

This cause involves the judicial enforcement of an administrative subpoena duces tecum. It originated by application of the Respondent to the District Court in Mississippi for the enforcement of a subpoena requiring Petitioner to produce for inspection its records of (1) wages paid its employees, (2) hours worked by its employees, (3) goods purchased, and (4) goods sold. An order to show cause was issued and served (R. 4, 12, 19).

Petitioner resisted the enforcement of the subpoena upon the grounds (a) that neither the Administrator nor the court had any jurisdiction over it under the Fair Labor Standards Act, under which the Administrator was proceeding, further than to ascertain whether Petitioner or any of its employees were within the purview of the Act, until such fact should affirmatively appear, where applicability of the Act was denied (R. 21, 22); (b) that neither Petitioner nor any of its employees were engaged in commerce or in the production of goods for commerce (R. 22); (c) that the Administrator had no cause to believe that the Act had been violated, Petitioner having exhibited to him all of its purchase, sales and service records showing that it was a retail and service establishment the greater portion of whose sales and service were intrastate, so that all of its employees were exempt from the wage and hour provisions of the Act, and their wage and hour records were not within the province of the Administrator for any purpose whatsoever (R. 23 and 26); that under those circumstances (d) the subpoena provisions of the Federal Trade Commission Act made applicable to the Fair Labor Standards Act would

violate the Fourth Amendment to the Constitution, prohibiting unreasonable search and seizure, if attempted to be applied to Petitioner (R. 27); and Sections 6, 7, 9, 11, 15 and 16 of the Fair Labor Standards Act would violate the Tenth Amendment if attempted to be applied to Petitioner, not being within the protection of the commerce clause or any other provision of the Constitution (R. 27). Petitioner denied all of the material allegations of the Administrator's application seeking to bring it within the purview of the law; and prayed a full hearing in open court upon the facts (R. 28).

Such hearing was in effect denied by an order of the court limiting the proof to affidavits, and the issue to one of probable cause to believe the Act had been violated (R. 30).

The affidavits filed by the Administrator (R. 12, 16, 32 and 37) wholly failed to set forth any facts to support the allegations of the Administrator's application, and the District Court had to look to the affidavits filed by Petitioner (R. 39-46) for some fact to support its holding that there was reasonable cause to believe that the Act had been violated and that the subpoena should be enforced, where it found nothing better than that in servicing the machines sold by it, produced in commerce (by someone else), Petitioner "closely approached the consummation of the business" (R. 47), thereby using against it the evidence improperly required of Petitioner in advance of a meeting of the burden of proof by the Administrator.

The affidavits filed by Petitioner, supra, fully sustained its claim that neither it nor any of its employees were engaged in commerce or in the production of goods for commerce, and that it was a retail and service establishment the greater portion of whose sales and service were intrastate, hence all of its employees exempt from the wage and hour provisions of the Act.

On appeal, the Circuit Court of Appeals for the Fifth Circuit affirmed the order of the District Court (R. 60); and granted a stay of the mandate pending the presentation of this petition (R. 62).

In so doing the Court of Appeals held that the District Court need not finally hear and determine the question of "coverage" before enforcing the subpoena, but that if it should appear that the investigation was clearly without just authority the court could very properly decline to assist; that the burden was upon Petitioner to so show, and not upon the Administrator; and that there was room to question whether Petitioner was a retail and service establishment within the exemption section of the Act (R. 56-60).

II.

Jurisdiction of Supreme Court of United States.

This being a civil cause to which Petitioner is a party, pending in a circuit court of appeals, where final judgment has been entered but issuance of a mandate stayed, the jurisdiction of the Supreme Court of the United States to review the same on writ of certiorari is predicated upon and fully sustained by Section 240(a) of the Judicial Code, as amended February 13, 1925, c. 229, par. 1, 43 Stat. 938, January 31, 1928, c. 14, par. 1, 45 Stat. 54, June 7, 1934, c. 426, 48 Stat. 926—28 U. S. C. A. 347(a)—which provides that in any civil case in a circuit court of appeals it shall be competent for the Supreme Court, upon the petition of any party thereto, after judgment, to require by certiorari that the cause be certified to it for determination, with the same power and authority, and with like effect, as if upon unrestricted appeal.

Statutes Involved.

The statutes of the United States involved in this proceeding are (1) the Fair Labor Standards Act of 1938, ap-

proved June 25, 1938, 52 Stat. 1060-1069, 29 U. S. C. A. 201-209; and (2) Sections 9 and 10 of the Federal Trade Commission Act, approved September 26, 1914, c. 311, pars. 9 and 10, 38 Stat. 722, 723, 15 U. S. C. A. 49, 50.

In the Fair Labor Standards Act, Section 1 provides a short title; Section 2, after setting forth the alleged evils to be corrected, predicates the Act upon the power of Congress to regulate commerce among the several States; Section 3 defines certain words and phrases as used in the Act, the definition of "commerce" being: "trade, commerce, transportation, transmission, or communication among the several States or *from any State to any place outside thereof*" (italics supplied); Section 4 provides for the appointment of an Administrator of a Wage and Hour Division in the Department of Labor, his employees and attorneys, and principal office; Section 5 provides for industry committees; Section 6 provides certain minimum wages for employees "engaged in commerce or in the production of goods for commerce"; Section 7 provides a maximum number of hours work in any one week for such employees, with time and one-half for overtime, subject to certain exceptions not here applicable; Section 8 provides for the establishment of certain wage rates, within limitations, upon recommendation of industry committees (no industry committee has been appointed affecting the business of Petitioner); Section 9 makes applicable, for the purpose of any hearing or investigation provided for by the Act, the provisions of Sections 9 and 10 of the Federal Trade Commission Act of 1914 (15 U. S. C. A. 49, 50); Section 10 provides for court review of any wage order promulgated under Section 8, but of nothing else; Section 11 provides that "The Administrator * * * may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in *any industry subject to this Act*, and may enter and inspect such places and such

records (and make such transcripts thereof), question such employees, and investigate such facts, conditions, practices or matters as he may deem necessary or appropriate to determine whether any person has violated any provision *of this Act,* or which may aid in the enforcement of the provisions *of this Act.*" (Italics supplied.) It also provides for the making and preserving of such records as to wages, hours, etc., as the Administrator may prescribe, by any employer "subject to any provision of this Act." Section 12 deals with the matter of child labor; and Section 13 has to do with exemptions, providing that: "The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater portion of whose selling and servicing is in intrastate commerce", and other classes of employees not involved here. Section 14 deals with learners, apprentices and handicapped workers; and Section 15 prohibits certain acts, including any violation of sections 6 or 7, section 11(c)—dealing with the making of records—and other provisions and regulations, and the making of false statements. Section 16 prescribes penalties, and permits any employees to recover their unpaid minimum wages or overtime compensation, with 100% damages and attorney's fees. Section 17 permits the issuance of injunctions to restrain violations of Section 15; Section 18 makes provision for the relation of the Act to other laws; and Section 19 is the usual separability section in event any provision of the Act be declared invalid.

Section 9 of the Federal Trade Commission Act provides that the attendance of witnesses and the production of documents may be compelled by subpoena issued by the Administrator, who may invoke the aid of any court of the United States, and that any district court within the jurisdiction where the inquiry is being carried on may issue an order

compelling obedience to such a subpoena. Section 10 provides certain penalties for refusal to attend, testify or produce documents.

DATE OF JUDGMENT.

The judgment of the circuit court of appeals sought to be reviewed was entered June 11, 1943.

AUTHORITY SUSTAINING JURISDICTION.

The case of *Endicott Johnson Corporation, et al.*, v. *Perkins, Secretary of Labor*, 317 U. S. 501, 63 S. Ct. 339, wherein certiorari was granted to the Circuit Court of Appeals for the Second Circuit, 317 U. S. —, 63 S. Ct. 35, being a case involving the enforcement of an administrative subpoena, is ample authority for the granting of a writ of certiorari in a case of this kind.

III.

The Questions Presented.

The questions presented by the record are:

1. Has the Administrator of the Wage and Hour Division, United States Department of Labor, or the District Court, any jurisdiction over an employer under the Fair Labor Standards Act of 1938, except to inquire into the question of "coverage" of the Act, where such coverage is denied, until it is established by proof?

2. Is an employer, respondent to an application of such Administrator for the enforcement of a subpoena duces tecum issued under said Act, entitled to a full hearing upon the facts, where applicability of the Act to it and its employees is denied under oath?

3. Is such Administrator entitled to an order for the enforcement of such a subpoena without proof upon his part

to sustain the allegations of his application therefor, where all of the material allegations thereof are denied under oath?

4. Was there reasonable cause to believe that the Act had been violated by Petitioner, under the facts disclosed?

5. Is the Petitioner or any of its employees engaged in commerce or in the production of goods for commerce, within the meaning of the Act, upon the facts disclosed?

6. Is Petitioner a retail and service establishment the greater portion of whose sales and service are in intrastate commerce, upon the facts disclosed, so that all of its employees are exempt from the wage and hour provisions of the Act?

7. If all of Petitioner's employees are so exempt from the wage and hour provisions of the Act, is the Administrator entitled to examine their wage and hour records, by court order or otherwise?

8. Is the Administrator entitled to an order of the District Court for the enforcement of a subpoena duces tecum for the production of records previously examined by him, and tendered for his further examination under such subpoena?

9. Are Sections 6, 7, 9, 11, 15 and 16 of said Fair Labor Standards Act of 1938 constitutional as attempted to be applied to an employer where neither such employer nor any of its employees are engaged in commerce or in the production of goods for commerce, within the meaning of the Act?

10. Are Sections 9 and 10 of the Federal Trade Commission Act of 1914, made applicable to the Fair Labor Standards

Act constitutional as attempted to be applied to an employer in such circumstances?

Questions are Substantial.

The questions here presented are substantial, because they involve (a) the jurisdiction of the Administrator of the Wage and Hour Division of the United States Department of Labor over employers not shown to be subject to the provisions of the Fair Labor Standards Act; (b) the jurisdiction of the District Courts in proceedings for the enforcement of the Administrator's subpoenas involving such employers; (c) the practice in the District Courts in such cases; (d) the burden of proof in such cases; (e) the basis upon which the Administrator is entitled to an order of enforcement of his subpoena; (f) what constitutes reasonable cause to believe that said Act has been violated; (g) what constitutes engaging in commerce or in the production of goods for commerce within the meaning of the Act; (h) whether or not Congress was placing a limitation upon the generally accepted meaning of "commerce", for the purposes of this particular Act, when it included within the definition thereof the words "from any State to any place outside thereof", but did not include "from any place without a State to any place inside thereof"; (i) what constitutes a retail and service establishment; (j) the rights of the Administrator to examine the wage and hour records of employees specifically exempt from the wage and hour provisions of the Act; (k) the right of the Administrator to an order for the enforcement of a subpoena for the production of records previously examined by him, and tendered for further examination under the subpoena; (l) the constitutionality of certain sections of the Fair Labor Standards

Act as applied to the Petitioner; and (m) the constitutionality of certain sections of the Federal Trade Commission Act, made applicable to the Fair Labor Standards Act, as applied to the Petitioner.

IV.

Reasons Relied On for the Allowance of the Writ.

The reasons relied on by Petitioner for the allowance of the writ are:

1. The decision here sought to be reviewed is in direct conflict with that of the Circuit Court of Appeals for the Sixth Circuit, in the case of *General Tobacco & Grocery Co.* v. *Fleming*, 125 Fed. (2d), 596, decided February 5, 1942, upon the questions as to the jurisdiction of the Administrator of the Wage and Hour Division and of the District Court; the right of a respondent to an application to the court by the Administrator for the enforcement of his subpoena to a full hearing upon the facts where applicability of the Act was denied; the practice in such cases, and the burden of proof; the matters which would constitute a defense to the application; and, in effect, the constitutionality of the stated sections of the Act as here sought to be applied.

2. The decision here sought to be reviewed is upon important questions of Federal law which have not been, but should be, settled by this Court, with respect to the practice in cases of application to the courts for the enforcement of administrative subpoenas; the rights of the respondents in such cases, and the burden of proof; and the limitation, if any, placed by Congress upon the meaning of "commerce" by its definition thereof for the purposes of, and in, the Fair Labor Standards Act.

3. The decision here sought to be reviewed, upon a Federal question, is probably in conflict with applicable decisions of the Supreme Court of the United States, in that it is in conflict with the principles announced in the decisions in the cases of *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 14 S. Ct. 1125; *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298, 44 S. Ct. 336; *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 58 S. Ct. 459; *Jones* v. *Securities Exchange Commission,* 298 U. S. 1, 56 S. Ct. 654; and *Federal Trade Commission* v. *Claire Furnace Co.,* 274 U. S. 160, 47 S. Ct. 553, as such principles were applied to a like situation by the Circuit Court of Appeals for the Sixth Circuit in the case of *General Tobacco & Grocery Co.* v. *Fleming,* supra.

Prayer.

Wherefore, your Petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in said Circuit Court of Appeals in the case therein entitled Mississippi Road Supply Company, Appellant, *vs.* L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, No. 10,583, on appeal from the District Court of the United States, for the Jackson Division of the Southern District of Mississippi, to the end that said cause may be reviewed and determined by this Court, as provided by law, and that the judgments of said Circuit Court of Appeals and said District Court may be reversed by this Honorable Court.

And that Petitioner may have such other and further relief as may seem meet and proper. And Petitioner will ever pray.

MISSISSIPPI ROAD SUPPLY COMPANY,
By C. C. BOADWEE, *Petitioner.*

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(7300)

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 206

MISSISSIPPI ROAD SUPPLY COMPANY, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 30–31) is not officially reported, but is printed in 5 Wage Hour Rept. 935. The opinion of the Circuit Court of Appeals (R. 56–60) is printed in 6 Wage Hour Rept. 591.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 11, 1943 (R. 60). The peti-

tion for a writ of certiorari was filed on July 29, 1943. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the District Court has power to order compliance with a subpoena *duces tecum* issued by the Administrator of the Wage and Hour Division without a determination that petitioner was subject to the Fair Labor Standards Act.

STATUTE INVOLVED

The statutory provisions involved are Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201, and Section 9 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 15 U. S. C., sec. 49. These provisions are set forth in the Appendix.

STATEMENT

On July 14, 1942, the Administrator, pursuant to Section 9 of the Fair Labor Standards Act, applied to the District Court for an order requiring petitioner to produce before the Administrator, or his authorized representatives, certain records described in an administrative subpoena *duces tecum* previously directed to petitioner (R. 10–12). The documents requested by the subpoena were petitioner's records showing wages paid to and hours worked by its employees for the period from October 24, 1938 (the effective date

of the Act), to the date of the subpoena, and petitioner's purchase, receipt, and shipping records pertaining to goods received at and shipped from petitioner's place of business during the same period (R. 11).

The application for enforcement alleged that petitioner was engaged "in ordering, receiving, unloading, and distributing road machinery and power equipment in interstate commerce" (R. 6). It further alleged that the Administrator had sought to make an investigation of petitioner's business pursuant to Section 11 (a) of the Act, but petitioner had refused to make the necessary books and records available (R. 6–7). An affidavit of a Wage and Hour Division regional inspector, filed as an exhibit to the Administrator's application, stated that it had been ascertained through investigations of petitioner's office, plant, and warehouse, that practically all of the goods handled, sold, and distributed by petitioner were received from outside the State of Mississippi, and that interviews with employees indicated that petitioner was violating the Act (R. 16–17). After the subpoena *duces tecum* was served on petitioner, its counsel offered to produce the purchase and sales records, but refused to produce the wage and hour records on the ground that petitioner was not engaged in commerce or the production of goods for commerce (R. 14–15).

Petitioner filed an answer to the application for enforcement (R. 21–29) in which it claimed that it

was not engaged in interstate commerce or in the production of goods for interstate commerce, that it was a retail and service establishment within the exemption of Section 13 (a) (2) of the Act, and that, therefore, the Court was without jurisdiction to compel it to produce its wage and hour records (R. 22–23). Petitioner admitted the jurisdiction of the court to require the production of such records as might be necessary to determine whether or not its employees were covered by the Act, but asserted that the court had no further jurisdiction until coverage was affirmatively shown (R. 22).

The District Court, after hearing, held that the burden was upon the Administrator "to show probable cause for the enforcement of said subpoena duces tecum" (R. 31), and ordered that respondent be allowed ten days within which to file affidavits in support of its answer and "that the record be then submitted to the court for a further order, upon the issue of probable cause, and upon the questions of law" (R. 31). Petitioner then filed an affidavit of its secretary and treasurer to the effect that it did not manufacture goods, but was a "retail dealer in road machinery, dirt moving equipment, tractors, graders, bulldozers, etc., machinery parts and supplies, grease, oil and explosives" (R. 39). The affidavit admitted that "practically all" of these materials were "purchased from manufacturers and producers located outside

of the State of Mississippi," and that upon receipt of the materials at the spur track on petitioner's property, the materials were unloaded by employees of petitioner (R. 39–40). However, the affidavit asserted that all of petitioner's sales had been within the State, except for sales amounting to $15,885.37 subsequent to January 1, 1941, or 1.2 percent of the total sales, and that the repair work for out-of-State customers amounted to only 3 percent of petitioner's total repair business (R. 39–42). The affidavit further claimed that petitioner's sales were "in small quantities, at retail prices, to the ultimate consumers." Affidavits of other officers were filed by petitioner to the same effect (R. 43–46).

After considering these affidavits, the District Court then ruled that the record before it was "sufficient to show probable cause for investigating the records and ascertaining all the true facts" (R. 48). It accordingly issued an order requiring petitioner to comply with the subpoena (R. 48–50).

The Circuit Court of Appeals affirmed, ruling that under this Court's decision in *Endicott Johnson* v. *Perkins,* 317 U. S. 501, the investigating authority has the right to investigate both coverage and violations in a single investigation (R. 59). The Court of Appeals pointed out that on the preliminary hearing by affidavits it appeared that some of the employees were probably engaged in interstate commerce and that the exemption

question was not free from doubt, and concluded that the District Court clearly had "a discretion to abstain from a present final enquiry into these matters, and to assist a full enquiry by the Administrator" (R. 60).

ARGUMENT

The issue in this case is the same as that involved in *Standard Dredging Corporation* v. *Walling,* No. 964, October Term, 1942, in which this Court denied certiorari on June 1, 1943. In the Government's brief in opposition to the petition for certiorari in the *Standard Dredging* case, we argued that this Court's decision in *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, was controlling, and that any conflict between the decision of the court below and that of the Sixth Circuit in the case of *General Tobacco and Grocery Co.* v. *Fleming,* 125 F. (2d) 596, was resolved by the *Endicott Johnson* decision. It was also pointed out that every Circuit Court of Appeals which had considered the question, except the Sixth Circuit, had taken the view that trial and determination of the applicability of the Fair Labor Standards Act is not a prerequisite to enforcement of the subpoena. *Fleming* v. *Montgomery Ward & Co.,* 114 F. (2d) 384 (C. C. A. 7), certiorari denied, 311 U. S. 690; *Cudahy Packing Co.* v. *Fleming,* 122 F. (2d) 1005 (C. C. A. 8), reversed, 315 U. S. 785, on the ground that the subpoena in that case was not issued by the Administrator; *Cudahy Packing*

Co. of Louisiana v. *Fleming*, 119 F. (2d) 209 (C. C. A. 5), reversed on the same ground, 315 U. S. 357; *Martin Typewriter Co.* v. *Walling*, 135 F. (2d) 918 (C. C. A. 1) *Walling* v. *Benson & Perkins* (C. C. A. 8), decided August 13, 1943.

There is even less occasion for granting certiorari in the instant case than there was in the *Standard Dredging* case. For, in the instant case, the District Court held that the burden was upon the Administrator to show "probable cause" for the enforcement of the subpoena, whereas in the *Standard Dredging* case the District Court ruled that the Administrator was not obliged "to make any showing that the respondent is engaged in commerce." 44 F. Supp. 601, at 602. The propriety even of a preliminary hearing by affidavits may be doubted. Certainly, however, no further inquiry or final determination was required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
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DOUGLAS B. MAGGS,
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AUGUST 1943.